IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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NO. 74-8

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J. B. O'CONNOR, M.D.,

Petitioner

V.

KENNETH DONALDSON,

Respondent

* * *

BRIEF OF THE STATE OF TEXAS, JOINED BY THE STATE OF TENNESSEE AND THE STATE OF UTAH, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici Curiae the States of Texas, Tennessee and Utah operate facilities for the treatment of the mentally ill pursuant to statutory enactments of the Legislatures of these states. Amici employ medical doctors, psychiatrists, and other professionals to administer such facilities and provide patient care. The decision of this Court in this matter will have a substantial impact upon the operations of the mental health facilities within the three states and could

affect the ability of amici to secure adequate professional personnel for the proper treatment of mentally ill patients within their care.

This brief is filed pursuant to Rule 42, Section 4, Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

Amici believe that the "right to treatment" found by the Fifth Circuit Court of Appeals below would be, if recognized by this Court, a right so difficult of application as to force lower federal courts into areas of medical practice and judgment, areas which the courts are particularly unsuited to administer. The field of medical treatment is uniquely inappropriate for the recognition of a new federal constitutional right.

If a federally protected right to treatment is announced by this Court, it should not be enforced in damages against individual doctors and other professionals who are employed in treatment programs which may be found to be violative of a right to treatment. Such an application under 42 U.S.C. Sec. 1983 is inconsistent with fundamental fairness and prior opinions of this Court. It would in addition make more difficult the already challenging problem of securing an adequate number of such professionals to serve in state operated mental facilities.

I. IT IS INAPPROPRIATE TO CAST THIS SUIT IN TERMS OF AN ACTION UNDER 42 U.S.C., SEC-

TION 1983 BECAUSE THE SUPREME COURT HAS NEVER RECOGNIZED A CONSTITUTIONAL RIGHT TO TREATMENT FOR MENTAL PATIENTS.

An action under 42 U.S.C., Section 1983 will lie only when a person acting under color of state law has deprived another of a federally protected right. In the instant case, no federal statutory right is claimed, and no constitutional right has been recognized by the Supreme Court. The Burnham case, arising in Georgia, is quite similar to the case at hand. In Burnham the State of Georgia provided a statutory right to treatment for the mentally ill, but the court was unable to find that a similar federally protected right existed:

> "This court is of the opinion that plaintiffs have failed to demonstrate or sufficiently allege the deprivation of a federally protected right. Since plaintiffs have not been deprived of any federal right, they cannot maintain this action pursuant to 42 U.S.C., Sec. 1981, 1983 and 28 U.S.C., Section 1343(3) and (4). See City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966); Vasista v. Weir, 340 F.2nd 74 (3rd Cir., 1965); Stringer v. Dilger, 313 F.2nd 536 (10th Cir., 1963); Marshall v. Sawyer, 301 F.2nd 639 (9th Cir.,

1962). Burnham v. Department of Public Health of State of Georgia, 349 F.Supp. 1335, 1340 (M.D. Ga. 1972)."

In the instant case, as in Burnham, no deprivation of a federally protected right is evident. Without such a jurisdictional foundation an action under 42 U.S.C. Section 1983 cannot be sustained.

II. ESTABLISHMENT OF A CONSTITUTIONAL RIGHT TO TREATMENT IS AN UNWISE PROJECTION OF THE COURTS INTO OVERSIGHT AND ADMINISTRATION OF AN AREA OF LEGISLATIVE PRE-EMINANCE WHERE FUNDAMENTAL MEDICAL OPINION IS LACKING IN CONSENSUS.

Recent efforts in the mental health area to establish a right to "adequate treatment" and to set forth the criteria which would fulfill such a right raise serious questions about the nature and extent of judicial supervision which would be required. The central problem lies in the difficulty of setting forth a legal definition of "adequacy" based on medical expertise. Although the courts have occasionally involved themselves in difficult areas of social endeavor, the adoption of a right to treatment would be unwise since: (1) the possibility of setting forth meaningful criteria beyond the vague Rouse standards is at best questionable given the lack of consensus in the medical profession and the con-

comitant reliance of the courts upon medical evaluations; and (2) the responsibility for setting forth the conditions of confinement is properly a legislative function.

A. Criticism Of The Judicial Formulation Of A Right To Treatment Focuses On The Wide Difference Of Professional Opinion As To What Constitutes Adequate Treatment.

Because of the nature of mental illnesses, psychotherapy responds in many highly complex and often imprecise manners. The literature of psychotherapy is fraught with a bewildering array of schools of thought, theories and approaches. See Current Psychiatric Therapies, vols. 1-4 (J. Masserman Ed. 1961-64). The court in Burnham v. Department of Public Health of State of Georgia, supra, at 1343, indicated the perplexing problem confronting a court upon evaluation of the adequacy of treatment:

> "Common to each of the plaintiffs' characterizations of the alleged 'right' involved is the word 'treatment'. The dictionary provides meager assistance to the court in attempting to 'judicially define' what the breach of that duty would be, to wit:....conduct or behavior towards another party....(or) the action or manner of treating a patient medically or surgically. (Citation omit-

ted). Experts in the field of mental illness are also of little help other than in providing analogous terminology, e.g. 'therapy'. Defendants cite the following comments by Dr. Thomas W. Szaz (Professor of Psychiatry, State Univ. of N.Y.) in his article 'The Right to Psychiatric Treatment: Rhetoric and Reality', 57 Goe. L. J. 740, 741, (1969) as indicative of the problem:

'Levine (M. Levine, Psychotherapy in Medical Practice 17-19 (1942)) lists forty (40) methods of psychotherapy. Among these, he includes physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs and electricity, and brain surgery. Obviously, the term 'psychiatric treatment' covers everything that may be done under medical auspices and more.

If mental treatment is all the things Levine and others tell us it is, how are we to determine whether or not patients in mental hospitals receive adequate amounts of it?" (emphasis added)

The vexing problem of defining "treatment" will arise every time an assessment of adequacy is put into issue. In Rouse three psychiatrists gave three different recommendations. Rouse v. Cameron, 373 F.2d 451, 459 (D.C. Cir. 1966). And as Judge Bazelon, has indicated, courts' experience with psychiatric testimony in other contexts raises faint hope about the clarity and usefulness of the testimony as a guide in a microscopic assessment of a course of treatment. Bazelon, Implementing the Right to Treatment, 36 U. Chi. L. 742 (1969).

Underscoring the difficulty is the arguably accurate reaction of the American Psychiatric Association to the Rouse decision that:

> "(t)he definition of treatment and the appraisal of its adequacy are matters for medical determination." Council of the American Psychiatric Assn., Position Statement on the Question of Adequacy of Treatment, 123 A. J. Psychiatry 1458 (1967).

Understanding that it is the medical profession which must, of necessity, supply the basic materials for evaluating treatment, the nature of such materials will necessarily control the efficacy of the evaluation. In the area of treatment, the nature of medical opinion is abundant and diverse -- consistency is not a virtue of the discipline.

The legal consequence of the diversity of professional opinion regarding the "adequacy" of treatment is that no judicial definition of a "right"

to treatment is possible. A right which is impossible to define and apply with any consistency is a right which is not amenable to judicial enforcement or protection. The Supreme Court has demonstrated its reluctance to base a legal right upon a illusory concept in its consideration of the "rights of unborn children" in Roe v. Wade, 410 U.S. 113 (1973). There the defendant State of Texas sought to justify its criminal abortion law as a protection of unborn children. The Court rejected that theory, observing that the rights of unborn children necessarily depend upon the question of when life begins. Faced with a mass of conflicting evidence and opinion -- religious, ethical, scientific, and medical -- on the question, the Court abandoned any attempt to define the legal right of the fetus and rather based its opinion upon the rights of the mother, rights capable of definition with real metes and bounds. Explaining its reluctance to judicially determine the rights of the unborn child, the Court declared:

> ". . . the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." Id., at 731.

In other words, the Court would not define any legal right which was dependent for its definition upon such conflicting and ethereal evidence.

The court here should refrain from adopting

a legal right to "treatment" when the definition of that right depends upon a conflicting and confusing array of professional opinion. The right to "treatment" is even more difficult to define than the right to "life," because there is at least general agreement in the medical community as to the approximate time at which fetal life is capable of existence outside the mother's womb. No such comforting verity is available in the area of the treatment of mental patients.

The federal judiciary is not equipped to judge the adequacy of treatment for everyone who is involuntarily confined in the United States. The criteria set forth in Rouse, supra, indicate the nature of the problem of the court offering guidance to mental hospitals:

> (1) "The hospital need not show that the treatment will cure or improve (the patient) but only that there is a bona fide effort to do so." Id., at 456.
>
> (2) "The effort should be to provide treatment which is adequate in light of present knowledge." Id., at 456.
>
> (3) "Adequate staff and facilities must be provided." Id., at 457-58.

Obviously the articulation of these criteria offer little if any constructive guidance to the institutions

expected to abide by them. Additional judicial construction will be required before the Rouse criteria take on the aspect of meaningful objective parameters. Katz, Right to Treatment -- Legal Fiction, 36 U. Chi. L. Rev. 755, 780 (1969).

If this new constitutional right is established, the courts will be transformed into administrative bodies for proceedings involving the mentally ill. One recent case demonstrates that the courts will have to inject themselves into the everyday operation of mental health facilities in order to insure what the court perceives as adequate treatment; in Davis v. Watkins, the court went so far as to list twenty items which must be covered by the records on each patient's individualized treatment plan. Davis v. Watkins, CA No. 73-205, 12 (N.D. Ohio).

2. Because The Medical Community Offers A Variety Of Treatment Concepts, The Proper Forum For Analyzing And Selecting A Particular Approach Is The Legislature.

The court in Huntt v. Government of Virgin Islands, 382 F.2d 38, 44 (1967), articulated the doctrine of judicial restraint:

> "We should think that a court of law and equity would hesitate to interfere in the performance by a legislative body of its political and policy decisions which, in the absence of

> evidence to taint or fraud, have as their primary, if not sole, objective, the general well-being of the community then selected to represent."

Legislatures have historically served as the arbiters of the problem of safeguarding the welfare of the involuntarily confined. Broad directives based on conflicting authority will hamper this proper role of the legislature.

Since the finding of a right to treatment should be made on an individual, case by case basis, the legislature is the one body which is capable of assuring an administrative mechanism which will offer the most appropriate level of services to the mentally ill.

Also, in an effort to compel legislatures to spend more money on mental health facilities, the courts may destroy the effectiveness of those facilities by placing an unreasonably high price tag on treatment. The end result of adopting this new constitutional right could well mean that the state will be able to care for only the most dangerous psychotic, and those representing no threat to the public will be locked out of the mental health system. Another absurdity resulting from the affirmation of this decision would be that the states will have no choice but to free any person who is involuntarily confined if he refuses treatment.

The Donaldson case is especially important since it raises the prospect that an intermediate level of health professionals will be subject to per-

sonal financial ruin. This decision, if allowed to stand, will exacerbate an already chronic shortage of qualified mental health personnel. Few doctors and psychologists will want to subject themselves to continuous litigation as a condition of employment by the state governments. It is patently absurd to force mental health professionals, at their own risk, to justify a particular allocation of state resources.

III. THE LOWER COURTS WERE IN ERROR IN IMPOSING PERSONAL LIABILITY IN THIS CASE.

A. The Court's Imposition Of Personal Liability Is Inconsistent With The Doctrine Of "Good Faith" Or Quasi-Judicial Immunity.

Assuming this Court holds that there is a constitutionally protected right to treatment, are those medical professionals who have served as a part of a treatment program, which is subsequently found to be constitutionally infirm, subject to monetary damages under 42 U.S.C. Sec. 1983 without a complete showing of their personal culpability? Amici believe that the Court of Appeals committed a significant and potentially tragic error in holding that they are subject to such liability.

In effect, the lower court held that a doctor who remained at his post, treating patiente as best he could, was personally liable if that treatment, at a later time, was found to be qualitatively less than

would have been available had powers and instrumentalities completely and absolutely beyond his control intervened to provide the resources necessary to a higher quality treatment program. No prior opinion of this Court condones, much less compells, such an incredibly draconian result. The Court of Appeals has at once stated a new constitutional right and applied the remedy of personal liability to an individual who could not have foreseen such a right during a course of conduct which occurred inclusively before such a right was recognized.

This Court has written at length on the retroactive application of newly recognized rights. In Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, (1967), plaintiffs (Negroes) were arrested as they attempted to seat themselves in a "whites only" area of a Jackson, Mississippi bus terminal. They were subsequently convicted of violating a misdemeanor breach of the peace statute. On the trial de novo appeal to the county court, a directed verdict in favor of one of the plaintiffs was ordered; and the cases against the other plaintiffs were then dropped.

The process within the lower Mississippi courts resulted in the exoneration of the plaintiffs. They then filed a Section 1983 action against the original trial judge and several of the arresting police officers. After the initial conviction of the plaintiffs and before the filing of the civil rights action, the Mississippi breach of the peace statute under which the prosecutions had been brought was declared unconstitutional under similar facts in Thomas v. Mississippi, 380 U.S. 524, 85 S.Ct. 1327 (1965). Following a jury verdict in favor of the

plaintiffs against the judge and the policemen in Pierson, the Fifth Circuit Court of Appeals held that the judge was immune from liability under Section 1983 for conduct committed pursuant to his judicial functions. However, despite the fact that Thomas had been decided some four years after the arrests, the Fifth Circuit held that the policemen were nonetheless liable in a civil rights action for unconstitutional arrest. That court found good faith and probable cause for the arrests to exist, but those findings were of no help to these defendants in the Fifth Circuit.

This case, Pierson, was then reviewed by the Supreme Court of the United States; and the reasoning of the Fifth Circuit was not allowed to stand. Chief Justice Warren for eight members of the Pierson Court spoke clearly:

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them under Section 1983." Pierson, supra, at 557.

Pierson restated a limited immunity for public police officers by way of the good faith and probable cause defense. The rationale for such immunity is simple enough: it would be basically unfair to require police officers and other public officials acting in good faith to become guarantors of the future course of constitutional development. See

Kenney v. Fox, 232 F.2d 288 (6th Cir. 1956), cert. denied 352 U.S. 855, 77 S.Ct. 84; Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Skinner v. Spellman, 480 F.2d 539 (4th Cir. 1973); Clarke v. Cady, 358 F.Supp. 1156 (W.D. Wisc. 1973); Collins v. Schoonfield, 363 F.Supp. 1152 (D.Md. 1973).

As to the trial judge, the Pierson Court agreed with the Fifth Circuit that the judge was immune from liability for damages as a result of his conduct in finding the plaintiffs guilty of breach of the peace.

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L.Ed 646 (1872)." Pierson v. Ray, supra, at 553-554.

Justice Warren described the broad borders of the judicial immunity and its critical necessity:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.'

(Scott v. Stansfield, LR 3 Ex 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349; note at 350, 20 L.Ed at 650). "Id. at 554.

The imposition of personal pecuniary liability or the threat of it, noted Justice Warren, ". . . would contribute not to principled and fearless decision-making but to intimidation." Id. at 554.

The facts of Pierson are strikingly similar in important detail to those before the Court in the instant case. The conduct of Dr. O'Connor was completely constitutional at the time it was committed. At no time while Dr. O'Connor and Mr. Donaldson were associated as doctor and patient at the Chattahoochee hospital did the law recognize a constitutional right to treatment for a patient involuntarily committed to a state mental institution. No doubt judicial immunity is unique in scope. However, application of the principles and rationale of such immunity requires the conclusion that it is of great importance, if quality care for mental patients in state facilities is important, that a medical doctor be reasonably free from the fear of personal liability as he practices in good faith the healing arts in the setting of an admittedly imperfect state mental institution.

Apparently, the Fifth Circuit in Donaldson and the Supreme Court in Pierson started from fundamentally different positions to reach conclusions regarding immunities under Section 1983. Justice Warren seems to imply in Pierson that as a general proposition, passage of Section 1983 left

fairly well intact common-law immunities and defenses:

> "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed 1019, 71 S.Ct. 783 (1951), that the immunity of legislators for acts within the legislative role was not abolished." Id. at 554.

The Fifth Circuit, however, appears to presume that since Section 1983 does not specifically speak to the matter of immunities or defenses, ". . . the full range of officials' immunity available at common law do not apply in actions brought under Section 1983." Donaldson, supra, at 530.

Despite the Fifth Circuit's conclusion that the jury heard sufficient evidence to find a lack of good faith on the part of Dr. O'Connor, that conclusion is almost exclusively based upon the fact that another physician managed to spend more time with Mr. Donaldson than Dr. O'Connor did. If the evidence did not so overwhelmingly indicate that hospital and staff resources were so lacking that extra attention to one patient inevitably resulted in lack of attention to others, such evidence might be of some probative value. The fact that Dr. O'Connor did not ignore patients who did not spurn the treatment he offered in order to focus on Mr. Donaldson, who refused to accept the treatment that Dr.

O'Connor in his medical judgment felt was indicated, appears to have been decisive, and resulted in holdings by the trial court and the Fifth Circuit that Dr. O'Connor failed to show good faith.

It is clear that a basic element of the good faith defense in cases where previously lawful conduct has subsequently been found unconstitutional is the reasonableness of the actor's belief that his conduct is proper and lawful. In that regard, it is of more than passing interest that Dr. O'Connor's conduct had been at least impliedly approved in a lengthy series of right to treatment suits brought by Mr. Donaldson during the course of his stay at the Florida State Hospital. He was unsuccessful in each instance. Donaldson v. O'Connor, 234 So. 2d 114 (Fla. 1969), cert. denied, 400 U.S. 869 (1970); Donaldson v. O'Connor, 390 U.S. 971 (1968); Donaldson v. Florida, 371 U.S. 806 (1962); In re Donaldson, 364 U.S. 808 (1960). Dr. O'Connor had absolutely no reason to believe that his conduct would later be judged retroactively by a new and unknown standard. It is difficult to imagine a situation in which a treating doctor could be more innocent of future constitutional development. Yet, the Fifth Circuit has cast the burden of its landmark decision on the shoulders of Dr. O'Connor. The result is wholly inconsistent with the holding and rationale of Pierson. Amici believe that the Fifth Circuit's treatment of the good faith defenses and immunities is superficial. Indicative of that superficiality is its apparent conclusion that because the defendants at trial failed to properly object to the trial court's inherently contradictory instruction on the good faith defense, a proper

consideration of it was somehow made by the jury. Indeed, amici submit that the jury instruction approved by the Fifth Circuit practically precluded a physician, working under conditions similar to those faced by Dr. O'Connor, from showing good faith. Donaldson v. O'Connor, 493 F.2d 507 at 527. It is unacceptable for the Court of Appeals to establish a broad and significant principle of law based upon a failure to enter a proper objection.

B. Imposition Of Personal Liability On Attending Physicians Is Likely To Produce Results Adverse To The Interests Of Improved Treatment In State Mental Institutions.

The Circuit Court's decision in this case is based upon its view that Mr. Donaldson received inadequate treatment at the Florida State Hospital. The decisions in Donaldson and in Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir., 1974) are, of course, judicial efforts to insure that treatment of involuntarily committed patients in state institutions is constitutionally adequate. The imposition of personal liability on doctors working within those institutions is not likely to improve treatment but is more likely to frustrate this objective.

In the case at bar, Dr. O'Connor worked within a hospital with admittedly limited resources. He was powerless to increase the appropriations for patient care; and he was likewise impotent to enlarge the medical staff of the hospital, to bring the staff-patient ratio more closely in line with the

demands of a large patient population. These responsibilities were and are the province of others. Unless and until the Legislature of the State of Florida determines that patient treatment at the Florida State Hospital at Chattahoochee will be improved and provides the resources for such improvement, improvement will not come regardless of what Dr. O'Connor and his collegues do within the institutions. This elemental fact has been ignored by the Fifth Circuit. Imposition of a personal judgment on Dr. O'Connor will add no additional psychiatrists to the staff at Chattahoochee. It will provide no additional psychologists, registered nurses, rehabilitation specialists, or attendants. It will provide no treatment programs, no new facilities. It will improve the treatment at Chattahoochee not at all. The decision means only that one more psychiatrist, desperately needed, can no longer afford to practice his art in a state hospital.

Indeed, Donaldson will surely exacerbate the problem of finding and hiring qualified medical professionals, a problem faced by every state operated mental institution. The services of psychiatrists are secured on a seller's market. It is no exaggeration to suggest that this decision will make psychiatrists harder to find. Few psychiatrists or medical doctors will be able to afford the luxury of potential personal liability for the sins of others, and the lot of the patients within these facilities will be made no better.

CONCLUSION

The Court should not recognize a federally guaranteed right to treatment under the United States Constitution. If the Court should hold such a right to exist, the Court should not affirm the lower courts' holding of personal liability against Dr. O'Connor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David M. Kendall, First Assistant Attorney General of Texas, Attorney for Amici, certify that a copy of the above and foregoing Brief of Amici has been served upon the parties hereto by depositing same in the United States Mail, Air Mail Postage Prepaid, addressed to each as follows: Honorable Robert L. Shevin, Attorney General of Florida, Attorney for Petitioner, Office of the Attorney General, The Capitol, Tallahassee, Florida 32304; Mr. George Dean, Attorney for Respondent, P. O. Box 248, Destin, Florida 37541; Mr. Bruce J. Ennis, Attorney for Respondent, 84 Fifth Avenue, New York, New York 10011.

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